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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1054

FLORENCE E. SMITH, Administratrix of the Estate of ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO., a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The written decision of the California Court of Appeal for the First District is appended to petitioner's brief as Appendix B. The written memorandum decision of the trial judge who granted respondent's alternative motions for judgment n.o.v. and new trial is appended to petitioner's brief as Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

QUESTION PRESENTED

Notwithstanding petitioner's contrary assertions, there is only *one* question presented by her petition: Was there any satisfactory evidence of negligence on the part of the railroad which caused or contributed to the decedent's death? Petitioner sets forth numerous "Questions Presented" in her brief (at pp. 4-5). However, each of the alleged "questions" assumes factual findings which were either expressly or implicitly resolved against petitioner by the California Supreme Court, the Court of Appeal, and the trial judge. For example, petitioner's first argumentative "question" asserts that this court is to decide whether the trial court (and the two state appellate courts) erred in granting respondent's motion for judgment n.o.v. despite "substantial evidence" (1) of negligence on respondent's part in exposing decedent to harm at the hands of negligent third party auto drivers, and (2) of steps that respondent could have taken to avoid such exposure to harm. Presented thusly, petitioner's asserted "question" would appear on its face to raise a substantial issue for review. However, the California courts have uniformly found, petitioner's assertion to the contrary notwithstanding, that there was "no evidence" (let alone "substantial evidence") supporting her contention of railroad negligence. A review of petitioner's other "questions" will reveal similar erroneous factual assumptions in each of them. Thus, the *only* question raised by petitioner's appeal is whether respondent was negligent and whether this negligence resulted in decedent's death.

STATUTE INVOLVED

The statutory provision involved is 45 U.S.C. § 51, which states in relevant part that

> "Every common carrier by railroad . . . shall be liable in damages to any [employee] suffering injury . . . , or,

in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."

STATEMENT OF THE CASE

A. Summary of the Facts.

The facts, briefly stated, are as follows: On April 12, 1966, Robert Smith, a 44 year-old engine foreman employed by the Southern Pacific Company (hereinafter SPCO) was run over and killed by an automobile while walking across Alameda Street in an industrial part of Oakland. The time was about 4:00 a.m. and the weather condition was characterized as "misty." The decedent wore a bright yellow hard hat, and was carrying a lighted switchman's lantern. The automobile was owned and operated by a Miss Trudy Baldes (now Mrs. Trudy Ann Coker). Mrs. Coker, an off-duty barmaid, had been drinking excessively. At the time of the accident, she was trying to elude an amorous pursuer who was chasing her in his car. In attempting to do so, she was traveling almost *double* the *speed limit* in the area and had *turned her lights out*, so as to avoid being seen by her pursuer. Moreover, she testified that for some time prior to, and at the time of impact, she was not watching the road in front of her, but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car chasing her. At no time prior to cutting down the decedent did Mrs. Coker see him, nor, apparently, did he see her, for she hit him squarely with the middle of her car. Both Mrs. Coker and her pursuer continued on down Alameda Street. It was not until several hours later that she decided to call the police and turn herself in. She was initially charged with felony vehicular manslaughter. Subsequently, however, the District Attorney's office reduced the charge to felony hit-and-run—to which Miss Baldes pleaded guilty.

Following introduction of the above evidence, the jury returned a plaintiff's verdict in the amount of $50,000.00. The trial court, concluding that there was no evidence of negligence on the part of SPCO which contributed to the decedent's death, granted SPCO's motion for a judgment n.o.v. and/or a new trial. Petitioner appealed to the Court of Appeal which affirmed the finding of the trial judge, concluding in part as follows:

> ". . . We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought."

Thereafter, petitioner appealed to the California Supreme Court, which, after a review of her comprehensive brief and of the record from below, declined to grant a hearing. This petition has followed.

Because petitioner's argument is exclusively confined to the facts, it will be necessary to set forth in some detail the facts which were considered by the California courts in reaching the decisions that they did.

B. Conduct of Trudy Baldes Coker.

On the date of the accident, Mrs. Coker (at that time 22 years old), was employed as a barmaid in an Oakland tavern. (Reporter's Transcript 275-76.)[1] One of the tavern's customers on the evening in question was a butcher in his early thirties named Walter Hutchison, whom Mrs. Coker met for the first time that night. (RT 278.) Hutchison, who was a friend of another barmaid, came in the bar about 9:00 p.m. and was still there drinking at the 2:00 a.m. closing

1. Hereafter, Reporter's Transcript will be designated RT; Clerk's Transcript will be designated CT.

time. (RT 278-79, 293.) Another customer in the tavern that evening was a 21 or 22 year-old fellow whose name she recalled as being Stan Freitas. (RT 279-80, 295.) During the course of the evening, Mrs. Coker inexplicably made early morning dates with both Hutchison and Freitas. (RT 279-81.) At 2:00 a.m., Mrs. Coker locked the bar's doors and proceeded to clean up. (RT 277-79.) Hutchison and the other barmaid stayed inside with Mrs. Coker instead of leaving with the other customers. (RT 278-79.) In Mrs. Coker's words, "they stayed in there with me drinking." (RT 281.) Soon thereafter, Hutchison and the other barmaid left. Mrs. Coker remained inside for another one-half to one full hour finishing her cleaning chores. (RT 281.) When she herself left the bar, Hutchison was parked outside in his car. It was dark and he was alone. (RT 281.) No words were exchanged by either of them. (RT 282.) Mrs. Coker got into her car, turned on her lights and drove off—hoping to "lose" Hutchison. (RT 282.) After driving around a few blocks without successfully evading him, she stopped her car, rolled down her window, and told him to "get lost." (RT 282-83.) Then Mrs. Coker headed for the place where she had agreed to met the younger man, Stan Freitas. (RT 284.) There, she signaled to Freitas that she was being followed by Hutchison. (RT 284-85.) However, because she was fearful of a confrontation between Freitas and Hutchison, she stayed only for about a minute before driving off toward Alameda Street (RT 285.) Hutchison continued to follow her. (RT 286.) As she drove along Alameda, a street with which she was not familiar (RT 295), at a speed she testified as being "35, 40 miles an hour"[2] (RT 296), Mrs. Coker decided to turn off her headlights, "Because I wanted

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2. The speed limit on Alameda Street is 25 miles per hour. (RT 70-71; 196.) Two witnesses to the accident estimated the speed of Mrs. Coker's car as being betwen 40 and 50 miles per hour (RT 71; 161.)

to lose the person in back of me." (RT 286.) By this time she was at a point "About a block and a half before the railroad tracks." (RT 286-87.) She testified that she turned the lights off, "So that as I went around the curve he wouldn't see me." (RT 286-87.) (The end of the curve is seen in the background of the photograph identified as defendant's Exhibit A and appears to be several hundred yards west of the point where the decedent met his death.) Mrs. Coker did not turn the lights on again until sometime after she struck and killed the decedent. (RT 287.) And she compounded the danger created by her speed and lack of lights by continuing to watch for Hutchison—in the rear-view mirror and by glancing over her shoulder. (RT 287; CT 168.) In fact, it was this inattention to the street in front of her that lead to decedent's death, for Mrs. Coker testified that at the time of impact she was watching for Hutchison's car in her rear-view mirror and had been for "a couple of seconds" *before* impact. (CT 288.) She stated that although she knew she had hit something, it was not until Hutchison later pulled her over that she found out it had been a person. (RT 287.)

C. Intoxication of Mrs. Coker.

Mrs. Coker's testimony concerning the *amount* of alcoholic beverages she consumed during the evening was filled with inconsistencies. She initially stated that she had consumed "three or four" bottles of beer, but then conceded that it was "four bottles." (RT 279.) Subsequently, when pressed, she revised her figure upward to "four or five beers." (RT 297.) It is submitted that the effect of the consumption of five beers (assuming that is all she had) would be considerably greater on a 22 year-old girl, (RT 275) weighing only about 130 pounds, (RT 279) than on, for instance, a 180-pound, 40 year-old man who has had years to develop a tolerance to alcohol.

Similar inconsistencies were present in her testimony concerning *when* she drank these beers. At first, she testified that all of the beer was consumed prior to the 2:00 a.m. closing time. (RT 292.) However, it was subsequently brought out that at her deposition (taken some 10 months after the accident), Mrs. Coker had testified as follows:

> "Q. Do you have any recollection of having drank any beers at all after the bar closed at two o'clock and up until the time that you left?
>
> "A. I know I drank some beers but I don't know how many. I don't remember." (RT 300-01.)

It was also brought out that she had testified at her deposition that most of her drinking had been done between the hours of twelve midnight and two-thirty, i.e., shortly before the decedent was killed. (RT 303.)

Although the testimony of Mrs. Coker concerning her drinking contains conflicts, there is no question but that she was under the influence of alcohol—if not legally intoxicated—as she sped away from her pursuer that evening. She conceded that she felt the effects of the beer and that she was "not sober." (RT 279, 292.)

D. Conduct of Decedent and the Train Crew.

Throughout the trial of this case, petitioner's attorney attempted to show that this accident occurred in a hazardous area; that the decedent was not provided safe equipment with which to perform his duties; and that SPCO required him to take known and dangerous risks in the course of performing his duties as an engine foreman. It is important, therefore, that the court be aware of *what* decedent's duties were on the night of the accident, and *where* those duties were being performed when he was struck down and killed.

The decedent was a 44 year-old engine foreman with SPCO. (RT 25, 39.) An engine foreman is a switchman charged with the responsibility of organizing and directing the efforts of the other switch crew members. The company tells the foreman what work it wants accomplished and the industries to serve, but it is up to the foreman to dictate to the crew the *details* of service, i.e., *how* the work is to be done. (RT 263, 261, 164, 145, 93, 65.)

The train crew in the decedent's group consisted of four men, including himself, two switchmen and an engineer. A railroad engineer takes his orders from the foreman. He does not and *cannot* move his locomotive without first getting an order from the foreman, either directly or through one of the other switchmen. (RT 77, 159, 164.) These orders are generally given by way of hand signals during the day and railroad lanterns at night. (RT 162, 93.)

All of the switchmen on the decedent's crew, including the decedent himself, carried these lanterns. (RT 68, 162.) The lanterns are battery-operated and contain two bulbs or globes. (RT 34, 253-54.) Lanterns, replacement batteries and globes are furnished free of charge by SPCO. (RT 68, 93.) Because of the extensive use of the lanterns by train crew members to communicate with one another at night,[3] one railroad employee witness called by petitioner to discuss railroading practices called his own lantern his "right arm." (251.) The same witness testified that a switchman's lantern is designed so that it can be seen by the engineer and other train crew members from any angle, regardless of the direction the holder is walking or facing. (RT 253-54; see also 214-16.) Another witness called by petitioner as an expert on railroading practices testified that a standard railroad

3. Engineer Parker testified that it was possible, with the exception of one unusual train move, for an entire evening to go by with communications between engineer and crew being accomplished solely by use of lantern signals. (RT 163.)

lantern of the type held by the decedent at the time he was run over, could be used to signal instructions 70 to 100 cars away. (RT 68.) Inasmuch as railroad boxcars (including couplings) average out to about 50 feet each, it follows that a standard railroad lantern can be used to pass signals as far as one mile.

The train crew reported for duty at 12:00 midnight (RT 30). Their job that night and morning was to pick up and deliver freight cars from and to various industries in the industrial part of Oakland. (RT 72, 76.) These industries are served by means of spur tracks running from SPCO rights of way. (RT 129-30.) At some time prior to 4:00 a.m., the crew reached the vicinity of the accident scene, i.e., the area around American Can Company. (See Exhibit A. The buildings shown in the right foreground of that picture are on the premises of American Can.)

Once decedent and his crew arrived at American Can, he walked across Alameda Street and placed a call on a private phone line to a burglar-protection company (ADT) employed by American Can, to advise that the crew would be going through several of American Can's gates. (RT 83-84, 220-21, 262.) He then picked up several switch lists (documents specifying the cars to be pulled from the premises) from a mailbox-like container which was located next to the ADT private phone. (The phone is shown as "S-3" and the switch list box as "S-4" on Exhibit A.) He then opened one of the gates leading into the premises, following which the engine came across Alameda Street; the crew hooked onto a car; pulled it out; and then "kicked" it down a track on the opposite side of Alameda. (RT 76-77, 80, 86-87.) Thereafter, decedent started across Alameda to open another American Can gate. He left the engine and the rest of the crew on SPCO's right of way across the street from American Can. (RT 65-66, 77-79, 81, 83.)

One of the crew members, switchman Siegfried, recalled that decedent's lantern was on and that he was wearing his "bright yellow" hard hat. (RT 34, 66.) At that time the switch engine was at rest, with its headlight on "dim," facing in the direction from which Mrs. Coker's automobile was coming. The time was about 4:00 a.m., and Siegfried characterized the lighting in the area as being "just fair." (RT 41, 72.) The weather was described as being "misty." (RT 176, 186, 189, 208.) When asked about the traffic conditions on Alameda Street that night, Siegfried testified that he had walked across the street at "various times" during the course of the same evening, and that he had encountered only "light traffic." (RT 87-88) When asked about the necessity of walking across public streets in order to perform regular railroad switching duties, Siegfried acknowledged that it was commonplace to do so; that in performing this same job over the past 15 years, he had done it the same way as on the night in question (RT 71-72); that there was nothing unusual about walking across Alameda Street that night (RT 87); and finally, that in walking across the street, the decedent was performing his job in the same way that it had been performed for "a long time before this accident." (RT 95-96.)

The decedent got to a point near the middle of Alameda Street before he was cut down by the Coker automobile. Neither engineer Parker nor switchman Siegfried saw the vehicle strike him, although both heard the impact. (RT 41, 46, 66, 155, 157.) They estimated the vehicle's speed as being 40-50 miles per hour. (RT 71, 161.) The speed limit along Alameda Street is 25 miles per hour. (RT 70-71, 196.) They testified that the Coker automobile did not have its lights on (RT 45, 71, 161); that it knocked the decedent flying through the air (RT 44, 66); that the Coker car was being followed by another car traveling "close behind" and with its lights on (RT 45); and that neither car slowed down or stopped following impact. (RT 45, 164.)

ARGUMENT

It has been SPCO's position throughout, that there was no evidence that it had done—or failed to do—anything which contributed to the death of Mr. Smith; that the sole proximate cause of the accident was the gross negligence of Mrs. Coker, concurred in perhaps by some contributory negligence of the decedent. It is submitted that the exhaustive statement of facts set forth above demonstrates that there was nothing SPCO could have done which would have *effectively* shielded the decedent from the blind flight of Mrs. Coker.

Following is a discussion of two relatively recent FELA decisions dealing with the liability of railroads to employees for injuries sustained as a result of the negligent driving of third parties. It is urged that these two cases, both of which were decided after *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-07 (1957), this court's leading decision on the question of FELA negligence, virtually compel a ruling by this court in favor of the railroad.

A. A Railroad Is Not an Insurer of the Safety of Its Employees; in an FELA Action the Plaintiff Must Prove That the Employer Was Negligent. And Negligence Cannot Be Grounded on the Failure of the Railroad to Shield the Plaintiff from Ordinary Traffic Hazards.

The leading case on the rule announced above, and closely on point with respect to the instant action, is *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138 (1959). It involved an FELA action brought by the plaintiff employee against the B&O for injuries suffered when he was struck in the middle of the night by a passing auto while on duty as a crossing flagman. The plaintiff had been assigned to this particular crossing for seven years—the last three on the same midnight shift. His duties as a crossing flagman *required* him to stand in the street near the crossing and flag cars—to warn

of passing trains. Moreover, he was *required*, while standing in the street, to face passing trains (to spot defective axles and hanging equipment), and he alleged that this requirement made his place of work unsafe, since it meant that he had to turn his back to traffic in the intersection. One night he was struck by an automobile at the crossing—despite the fact that he was carrying a lighted lantern in both hands. The driver of the auto, like the driver in the instant case, had been drinking and had run a stop sign prior to striking the plaintiff and, in doing so, had committed a total of five traffic violations.

The trial court submitted the issue of negligence to the jury, which found the B&O negligent "in part" for failing to provide "enough protection." The Ohio Court of Appeals reversed on the grounds that "there was a complete failure of proof to establish the negligence." The court continued in relevant part as follows:

> ". . . And there is further *no evidence of prior occurrences of the kind here under consideration,* which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.
>
> "That the plaintiff, while in discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, *was not, in our opinion . . . reasonably foreseeable* by defendant.
>
> "There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it." (108 Ohio App. 124; 161 N.E.2d 60, 66 (1958), emphasis added.)

The court went on to conclude that at worst,

> ". . . Defendant created a situation in which the negligence of [the driver] operated to bring about the injury. Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury." (Id.)

The Ohio Supreme Court affirmed. This court granted certiorari and likewise affirmed, saying in part:

> "In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), we laid down the rule '[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.' *Id.*, at 506-07. In measuring Ohio's disposition of the case here by the *Rogers* yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had been working at [the intersection in question] for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> ". . . The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record." (361 U.S. 140.)

This court concluded that the facts as set forth above, together with testimony of a single witness that cars frequently "jumped the gun" at the crossing, were insufficient to support a finding of negligence. It agreed with the Ohio Court of Appeals that there was "*no evidence of prior occurrences of the kind under consideration*" (emphasis added), which would support the testimony of the aforementioned witness. It held, therefore, that based on the evidence, the trial court should not have submitted the question of negligence to the jury.

SIMILARITIES BETWEEN INMAN AND THE INSTANT CASE.

Traffic infractions. In *Inman*, this court was impressed with the extent to which the auto driver had violated traffic rules (five in all) in injuring the plaintiff. In the instant case the same is true: Mrs. Coker was arguably guilty of (a) drunken driving; (b) reckless driving; (c) excessive speed; (d) driving without lights on; (e) failure to yield to a pedestrian; and (g) failure to stop and give aid.

Lanterns. In both *Inman* and this case, the injured parties were carrying lighted lanterns, yet were still hit.

Drinking drivers. In both cases the injuries were caused by drinking (if not drunken) drivers.

No equipment failures. In both cases all railroad equipment was operating properly.

Prior complaints or similar occurrences. The *Inman* court noted that although one of plaintiff's witnesses had testified that "a lot" of cars "jumped the gun" at the crossing, there was no evidence of prior "*similar occurrences*" in the record. The record in this case is similarly bare. In fact, it was uncontroverted that Assistant Terminal Superintendent O'Donnell (a "candidly honest fellow," said petitioner's attorney in his closing argument) could not recall any auto-pedestrian accident or near accident involving train crews during the 10 or 15 years he had worked in the Oakland area.

DISSIMILARITIES BETWEEN INMAN AND THE INSTANT CASE.

In several respects, *Inman* can be distinguished from the case at hand. However, most of those points of distinction favor the contention of SPCO that it was not negligent, and that the death of the decedent was the result of the concurring negligence of Mrs. Coker and the decedent.

Place of work. Inman was *required to stand in the street* as part of his job. Moreover, he was required to stand with his *back to the traffic* in order to observe passing trains. The decedent, on the other hand, was required only to do a job which entailed that he—like millions of other employees in all kinds of occupations—use the city streets to walk across; a very incidental use. If this court could not find that Inman's work location was an inherently unsafe place to work, surely it could not so find in the instant case.

Amount of traffic. The street in which Inman was injured was described as being "heavily traveled." On the other hand, auto traffic on Alameda Street that night was described as being "light." (In fact, switchman Siegfried couldn't even remember when the last car preceding Mrs. Coker's had come by.) It seems clear, therefore, that the street area where Inman was required to work was much more dangerous, potentially, than the one involved in this case.

Contributory negligence. There is no hint in the *Inman* decision that the plaintiff himself was negligent. In the present case, however, it is quite likely that the decedent would not have been killed had he been alert to the possibility of oncoming cars.

Headlights. Inman was also injured at night. If the driver who ran over him was operating without headlights, the reviewing courts did not deem it worthy of mention. It is uncontroverted, however, that Mrs. Coker was driving with her lights out.

The other federal decision which directly supports the position of the three California courts below is *Simpson v. Texas & N. O. R. Co.*, 297 F.2d 660 (5th Cir. 1962). There, the plaintiff-employee brought an action under the FELA for injuries suffered when he was struck by an auto while within the scope of his employment. Plaintiff was a mes-

senger for the defendant railroad. The defendant furnished him with a motorcycle which he used in his employment. On the date of the accident, the motorcycle broke down. Plaintiff therefore called his superior and was told to use public transportation instead. This plaintiff did. Upon reaching his destination, he got off the bus and began crossing the street. At the time it was raining heavily. An approaching car failed to stop and hit the plaintiff, causing severe injuries. In the action, plaintiff alleged that the railroad had been negligent in the following respects:

> (1) In failing to furnish plaintiff with a safe means of transportation;
>
> (2) In failing to maintain the equipment which plaintiff was required to use in a safe and workable condition;
>
> (3) In failing to remedy the defect to the motor cycle upon learning of this condition; and
>
> (4) In failing to furnish plaintiff with proper protection from the weather when defendant knew that plaintiff, in the course of his occupation, would be required to be out in all types of weather.

The District Court sustained the defendant's motion to dismiss the complaint. On appeal the dismissal was affirmed. While agreeing that if the plaintiff had been injured as the result of an accident associated with the breakdown of the motorcycle, his action would have been good, the court held that once the plaintiff left the motorcycle and got on the bus

> ". . . the chain of causation between breakdown of the motorcycle and any subsequent occurence was broken, and plaintiff's situation was no different than it would have been if he were normally required to perform his duties on foot and by use of public transportation. Thereafter plaintiff's injuries were caused by an ordinary automobile accident which may have been unavoidable, or may have resulted from the negligence of the automobile driver, the negligence of the plaintiff,

or both—but clearly not the negligence of the defendant railroad. *To hold that defendant should have shielded plaintiff from ordinary traffic hazards is tantamount to making it an insurer.* The Act does not make the railroad company an insurer against personal injuries to its employees.

> *"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results from the action of some third person."* (297 F.2d 662, emphasis added.)

It is urged that on the basis of the record herein and the foregoing FELA decisions, the trial judge was correct in granting SPCO's motion for a judgment n.o.v.; and that the California appellate courts had little choice but to affirm.

Other FELA cases of varying degrees of helpfulness to SPCO's case are as follows:

Shea v. New York, N. H. & H. R. Co., 316 F.2d 838 (1st Cir. 1963), in which directed verdict for employer-railroad was upheld on appeal where plaintiff had been run over in railroad's parking lot by the auto of a third person; *Chesapeake & Ohio Ry. Co. v. Burton*, 217 F.2d 471 (4th Cir. 1954), where jury verdict in favor of plaintiff conductor, who was struck by a drinking driver while standing at a crossing near his stalled train, was reversed on appeal, the court holding that there was no evidence of railroad negligence; *Ambold v. Seaboard Air Line R. Co.*, 345 F.2d 30, 34 (4th Cir. 1965), where judgment n.o.v. in favor of defendant railroad was affirmed on appeal, it appearing that plaintiff's fall from a platform which he had walked over many times before and after the accident was the result of his own inattentiveness; *Cuddy v. Western Maryland Ry.*, 229 F. Supp. 443, 445 (D.C.Pa. 1963), aff'd 332 F.2d 371 (3rd Cir.

1964), cert. den. 379 U.S. 340 (1964), where a judgment n.o.v. in favor of the railroad was affirmed, the court holding that the trial record concerning the shooting of plaintiff's deceased by a fellow employee demonstrated little evidence of employer negligence; *Spinello v. New York C. & St. L. R. Co.*, 181 N.E.2d 884 (Ohio 1962), where a judgment n.o.v. in favor of the railroad was affirmed on the ground that there was no evidence of railroad negligence causing the death of the plaintiff's deceased, who died as the result of an auto accident occurring in the course and scope of his employment. See also *Hughes v. Great Northern Ry. Co.*, 462 P.2d 879, (Mont. 1969); *Gulf M. & O. R. Co. v. Joiner*, 29 So. 2d 255 (Miss. 1947); *Rhinelander v. St. Louis & S. F. Ry. Co.*, 257 S.W.2d 655 (Mo. 1953).

B. Brightly-colored Paraphernalia Would Have Been of No Value to Decedent.

Petitioner contends that SPCO was negligent in not providing the decedent with bright colored clothing and paraphernalia which would have made him visible at night to oncoming motorists. The answers to this contention are as follows:

Blind flight of Mrs. Coker. Mrs. Coker failed to see the decedent even though he was wearing a bright yellow hard-hat and was carrying a lighted lantern that could be seen from any angle for distances of up to a mile. The obvious reason she didn't see him was because she wasn't looking out her windshield; and even if she had been, her criminal act of driving twice the speed limit with lights out, would have prevented her from seeing him anyway.[4]

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[4] See, e.g., the testimony of petitioner's own expert witness. During the direct examination of the witness, petitioner's attorney introduced into evidence several bright-colored gadgets and items of clothing, such as a red hat and an orange vest. (RT 192.) On cross-examination, however, the expert admitted that under the facts of this case, the colored objects would have been of little, if any, value. After the witness conceded that it was dangerous for

Need for independent light source. Even petitioner's own witnesses conceded on cross-examination that the bright-colored paraphernalia would have been valueless under the circumstances of the case. For example, petitioner's expert was asked about the effectiveness of the paraphernalia in the absence of a light source shining on them. Although the record doesn't indicate what items the witness was inspecting, his testimony leaves one with a distinct impression that few, if any, of the items introduced as suggested safety aids are visible in the absence of an independent light source. (RT 203-04.) And the witness expressly conceded that the bright tape strip on the helmet would not shine unless a light was directed toward it. (RT 204.)[5]

Mrs. Coker to have been traveling as fast as she was with her lights out at 4:00 in the morning, the following testimony was elicited (at RT 196-97):

"Q. And intersection or no intersection, if you are going two times the speed limit without your lights on and not looking through the windshield, none of this [the brightly colored paraphernalia] would do any good to prevent an accident, would it (indicating)?

"A. If you are driving without your lights and not looking through the windshield, that's right.

* * * *

"Q. If you are driving two times the speed limit without your headlights on at four o'clock in the morning, and it is dark, then in your expert opinion none of these things (indicating) would do one bit of good; is that correct?

"A. That is correct.

"Q. Everything you said [on direct examination about the possible value of the paraphernalia] presupposes that the motorist is looking where he or she is going; is that correct?

"A. Yes.

"Q. If we added to that the fact that—assumed that the motorist is exceeding the speed limit by two times, not looking through the windshield, light off, and is in a semi-intoxicated condition, you would also agree that none of these things would do any good in preventing an accident (indicating); is that correct?

"A. Apparently not. Probably not."

5. Similar testimony was elicited during the testimony of switchman Siegfried (RT 70):

"Q. Now, the difference between a fusee [a flare] and this paraphernalia on counsel's table is this: it [a fusee] illumi-

Availability of other warning devices. There was an abundance of evidence that the train crew (which, it should be recalled, was under the direct supervision of the decedent himself) had access at all times to intensely bright flares (called "fusees" on the railroad) and a large red flag which could have been used to warn passing motorists of the presence of the train crew—had the decedent felt that it was necessary to do so.

The flares and the flag were on the locomotive (RT 69, 101-02, 116-17, 148, 163), and were available to "anybody" on the crew who wanted one. (RT 69, 102-03, 116-17, 147-48.) Contrary to petitioner's assertion (p. 11 of her brief), fusees are a standard railroad signaling device and are frequently used in inclement weather because of their brilliance. (RT 146, 147, 149.) Moreover, there was no rule prohibiting the decedent from utilizing a fusee under the circumstances present in this case. (RT 69, 98, 102-03, 116-17, 147, 148.)

Incompatibility of paraphernalia with railroad operations. Much of the paraphernalia introduced by petitioner was impractical for use in railroad operations and was offered only for "show" purposes. This point was illustrated by one of petitioner's *own* witnesses (McNamara), a retired switchman with over 40 years of railroading experience. On direct examination, petitioner's attorney asked McNamara about the use of some of the paraphernalia to put in

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nates itself; these things [petitioner's paraphernalia] have to have lights shined on them. Is that right?

"A. That's right.

"Q. You have seen these kinds of things [petitioner's paraphernalia], I take it?

"A. Yes.

"Q. If you don't shine a light on this, if you have your headlights off, it isn't going to illuminate, is it?

"A. Not much.

"Q. But a fusee, if you put it down you don't have to shine any lights on it, do you?

"A. That's right."

the street to warn that a man is going to be walking across. (Nothing was said about the protection to be afforded the man setting the devices out on the street in the first place.) McNamara allowed as how the paraphernalia were "nice", but then went on to say: "Yes, but what are you going to do? How are you going to carry them?" (RT 118-19.) Similarly, McNamara was asked on cross-examination about the brightly colored vest that petitioner's attorney had suggested would be effective for focusing a driver's attention on a switchman-pedestrian. The testimony (RT 119-20) was as follows:

"Q. Well, Mac, when you are in the switching business, you don't want to be wearing a loose garment like this, is that right; you don't want loose garments that catch on things when you are working, hanging on cars, is that right?

"A. No, you wouldn't.

"Q. And why is that?

"A. Well, you could be taken off of the side of a car if you had loose—or something projecting out in these industrial yards, and there are fences and there are gates and there are walls.

"Q. What do you mean by 'taken off;' the garment would catch on something and pull you off the car?

"A. That's right."

Lack of evidence of safety value of suggested paraphernalia. The record is absolutely devoid of *any evidence* concerning the *safety value* of the various devices introduced into evidence by petitioner. No one testified, for example, that a phosphorus wand is valuable when stuck in a flashlight; that it is more visible at night than a railroader's lantern; or, that its use would be compatible with ordinary railroad practices. Apparently, petitioner's counsel assumed throughout the trial that his paraphernalia had some sort

of inherent, intrinsic safety value which required no discussion or explanation. It is submitted that much more was required than the simple introduction into evidence of the devices. It is urged that the failure to bulwark the tangible evidence with *testimony* concerning its value constitutes one more fatal flaw in petitioner's case.

C. Respondent Did Not Require the Decedent to "Jay Walk" Across Alameda Street.

Throughout petitioner's brief there are references to the alleged fact that SPCO "required" the decedent to "jaywalk" across Alameda Street. There is not one shred of evidence in the record to support this contention. In California, the term "jaywalk" is a term of art which denotes an *illegal* crossing of a street (a) *between crosswalks* or traffic control signal devices (see Calif. Vehicle Code § 21955) such as would be the case if one walked across the street in the middle of the block in a *regularly intersected* downtown area—which Alameda Street is not—or (b) at an *angle across* other streets, such as would have been the case if the decedent had been walking across Alameda Street at a sharply acute angle (see Vehicle Code § 21956).[6] Suffice it to say that petitioner has not pointed to any evidence (because there is none) which would support her use of the term "jaywalk." There is no evidence in the record that the decedent was doing anything except walk directly across Alameda at the moment he was struck down. Accordingly, it is suggested that petitioner's constant use of the term is deliberately inaccurate, misleading and inflammatory.

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6. The fact is, there are no statutory restrictions in California which would preclude one from walking across industrial streets such as Alameda, which is not regularly intersected and which does not have traffic signals or pedestrian crossings. (See Vehicle Code § 21954, which permits a pedestrian to cross unmarked streets such as Alameda.)

Furthermore, the evidence was uncontroverted that the decedent, as the man in charge of the train crew, could have ordered the engineer to drive him across Alameda on the locomotive. (RT 257-58.) However, had he done so, it would have taken several extra minutes to get across the street because of the need to properly align all the right switches (RT 258, 260); would have left the engine sitting across the middle of the road while the gate into American Can was being opened (RT 258); and would still have required him to drop down from the engine into the street before walking over to the gate. (RT 258-60.) The decedent's failure to order the engineer to drive him across can be attributed to (a) the fact that as a result of his years of experience on that job, he did not think that it was necessary; (b) the inconvenience in terms of time spent and effort expended; (c) the fact that the engine blocking the street would create a much more dangerous situation—for both the train crew on the engine and the motoring public; and (d) the fact that the gate opener would still have to drop into the street before getting over to the gate, and hence, be exposed to the same traffic hazard.

D. The Area Where the Decedent Was Working Was Not a Dangerous Area.

Petitioner contends that the decedent was required to work in a dangerous area. This contention is based on the fact that there were 34 auto/train accidents—dating as far back as 1928—in the Oakland Terminal area (which covers many square miles and over 1,000 railroad-served industries) prior to decedent's accident.[7] (RT 133.) As footnote 7 indicates, there was no evidence of prior accidents before

7. Both here and in the appellate courts below petitioner has *improperly* raised the subject of prior accidents. As her brief points out, there were 34 auto/train collisions—occuring all over the Oakland Terminal—prior to decedent's accident. Petitioner learned of these accidents through answers to interrogatories. At

the jury. However, because petitioner insists on raising the question on appeal, several points should be made in rebuttal.

No prior similar occurrences. There was no evidence proffered or introduced in this trial about prior accidents involving *pedestrians* (railroad employees or otherwise) and motor vehicles. The only time the subject came up was when petitioner's attorney was questioning Assistant Terminal Superintendent O'Donnell, whom that same attorney characterized in closing argument as being "candidly honest." (RT 321.) Mr. O'Donnell was asked whether he was aware of any prior incidents wherein train crew members were hit or nearly hit at night, by motor vehicles, near the American Can premises. To which he replied: "I do not recall any accident or near accident reported to myself or any of my subordinates during the 10 or 15 years prior to the accident that I have worked in this area." (RT 139-40.)

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trial, she twice attempted to introduce evidence of same. (See RT 138-40, 170-76.) The second occasion was a formal offer of proof made in the trial judge's chamber. The offer consisted merely of reading those answers into the record. Her attorney knew nothing about the facts of any of the accidents; he did not know where the crossings were that he was referring to; he did not know whether the accidents happened during the day or at night; he did not know what geographical surroundings were involved in the other accidents; and he did not know what weather conditions were involved in the other incidents. (See RT 170-76.) The judge refused to admit the evidence on the ground that the offer of proof was "completely lacking in foundation." (RT 176.) Following this ruling, petitioner did nothing—despite the fact that the trial lasted four more days—to prepare a proper foundation as to similarity of accidents, conditions, etc. Instead, she acquiesced in the trial judge's ruling. However, the fact that there was no evidence in the record concerning prior accidents has not prevented her from raising the point again and again on appeal (although, significantly, she has not appealed the ruling of the trial court in refusing the proffered "evidence"). Now, before this court, petitioner brazenly states that "the Court of Appeal appears to have accepted this proffered testimony" concerning prior accidents in the Oakland Terminal area. It is submitted that the Court of Appeal did no such thing, for it expressly held that "There was *no satisfactory evidence* that the area was particularly hazardous." (Emphasis added.)

Accidents were atypical. As noted in footnote 7, petitioner learned of the prior accidents from certain of SPCO's answers to interrogatories. Those answers showed, among other things, that there were no fatalities involved in the prior accidents and only two injuries. This indicates that most of those accidents probably involved the striking of parked cars (parked on or too close to the various spur tracks in the industrial areas of Oakland), since typically, train-auto crossing accidents have a much higher percentage of injuries and deaths.[8]

E. Plaintiff's Petition Does Not Present Any Novel or Undecided Legal Issues; It Simply Asks This Court to Review and Reweigh Evidence Already Passed Upon by Three California Courts.

Petitioner made the same arguments in the three California courts that she makes to this court, and all three resolved the purely factual issues against her: all found that there was no evidence of negligence on the part of the railroad which contributed to the decedent's death; that the cause of the accident was the criminal recklessness of Mrs. Coker, concurred in perhaps by some contributory negligence of the decedent himself. (See Court of Appeal opinion, p. B-7; trial court memorandum opinion, p. C-3.) Petitioner does not contend, nor could she, that the courts below failed to follow the correct rules of law applicable in FELA cases. She simply urges that the California courts have paid "lip service" to them, but have failed to follow their guiding principles.

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8. Exhibit A demonstrates how close autos park to train tracks in the area. Often, train crews try to squeeze by these parked cars when their owners can't be located and, in the process, hit the autos with the corners of large boxcars (which have considerable overhang). These collisions, then, are reported to the Public Utilities Commission. It is submitted that if petitioner's attorney had been prepared to discuss the facts of prior accidents, most would have been of this variety:

In that regard, one important point should be made. The *same* Court of Appeal panel that decided the instant case also decided the leading California case on FELA negligence/causation—*Mortensen v. Southern Pac. Co.*, 245 Cal. App.2d 221 (1966).[9] In that case, on very little evidence of negligence, SPCO was held liable to an employee for failing to have provided his company vehicle with seat belts. The Court of Appeal held it should have been foreseeable to SPCO that with its large fleet of vehicles, many would be involved in accidents—often at the hands of negligent third parties—and that therefore, SPCO should have equipped its vehicles with seat belts. In the case at bar, however, the same appellate panel ruled that it was not foreseeable that an employee would be struck down by a drunken girl, traveling twice the speed limit with her headlights off, trying to elude a would-be suitor. Accordingly, this case is not one decided by an appellate court unfamiliar with the usual strict FELA principles, but one decided by a court sophisticated in the rules applicable to such cases.

For the reasons discussed above, the petition for a writ of certiorari should be denied.

DATED: March 14, 1972

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9. Petitioner's attorneys thought so highly of the reasoning in the *Mortensen* case, they cited in on six separate occasions in their opening brief before the Court of Appeal.